IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-1356

REINALDO FLECHA, *et al.*,
Petitioners,

vs.

F. RAY MARSHALL and LEONEL CASTILLO,
Respondents.

BRIEF OF UNITED FARM WORKERS OF AMERICA, AFL-CIO AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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STATEMENT OF INTEREST.

This brief *amicus curiae*, submitted by the consent of the parties,[1] is filed

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[1]The original letters of the parties consenting to the submission, *amicus*
[footnote continued on next page]

on behalf of the United Farm Workers of America, AFL-CIO,[2] a labor association formed and maintained for the purpose of organizing and representing workers employed in agriculture. In the approximate fifteen years of its existence, the United Farm Workers has expanded from a small group of farm workers seeking better wages and working conditions to a nationwide organization successful in the organization of this hithereto unrepresented and deeply divided segment of the American workforce. From the inception of the United Farm Workers, its primary goals have been the advancement of wages and working conditions in agriculture through worker self-organization and collective bargaining and the betterment

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[1][footnote continued from previous page] *curiae* (Rule 42(1), Rules of the Supreme Court), of a brief on behalf of the United Farm Workers of America, AFL-CIO are being submitted to the Clerk contemporaneous with the submission of this brief for filing.

[2]Hereinafter referred to as "United Farm Workers".

of the living conditions for those working in the Nation's fields.

Although not immediately involved in the dispute giving rise to this action,[3] the decision of the Court of Appeal[4] necessarily affects the ability of the United Farm Workers to organize in the agricultural sector and undermines advancements in wages and working con-

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[3]The United Farm Workers is, however, actively affiliated with the Asociacion de Trabajadores Agricolas de Puerto Rico, a labor organization formed by Puerto Ricans working in the Continental United States pursuant to agreements between growers and the Puerto Rican government. (See, *In re Asociacion de Trabajadores Agricolas de Puerto Rico*, 376 F.Supp. 357-358 (D. Del. 1974), *aff'd sub nom. Asociacion de Trabajadores, Etc. v. Green Giant Co.*, 518 F.2d 130 (3rd Cir. 1975).) Because of this affiliation, the outcome of this action will directly influence the United Farm Workers' organizational efforts.

[4]Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit, *Reinaldo Recha, et al. v. F. Ray Marshall and Leonel Castillo*, (No. 77-1356, filed March 24, 1978; hereinafter referred to as "Petition"), Appendix B. The decision is reported at 567 F.2d 1154.

ditions fought for and won by workers the United Farm Workers represents. Such adverse consequences will follow ineluctably if the Court of Appeals' decision stands, for in practical effect, it endows the Secretary of Labor[5] with the power to dictate wage rates and working conditions for farmworkers engaged in agricultural production. Such a result not only contravenes basic public policy, but debilitates efforts by the United Farm Workers to secure improvement in the historically low wages and dangerous working conditions imposed upon the agricultural workforce.

Because both the immediate and potential future consequences of the Court of Appeals' decision weakens nascent organization of the agricultural sector, the United Farm Workers submits this brief in support of the Petition filed in this action.

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[5]Hereinafter, the Secretary of Labor will be referred to as "Secretary".

QUESTIONS PRESENTED.

1. Whether the United States Secretary of Labor and the United States Commissioner of the Immigration and Naturalization Service have violated the Immigration and Naturalization Act, 8 U.S.C. §1101 *et seq.*, by construing that Act and the regulations promulgated thereunder so as to deem unavailable for employment all United States workers who seek wages and working conditions higher than those minima contained in the foreign worker regulations at 20 C.F.R. §§602.10-.10b?

2. Whether the above construction interferes with the right of United States workers to bargain with their employers over wages and working conditions, as guaranteed by the United States Constitution and federal and state law.

SUMMARY OF ARGUMENT.

The H-2 program,[6] an outgrowth of

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[6]Section 101(a)(15)(H)(ii) of the

war-created labor shortages has, through years of substantial unemployment, been utilized to permit the importation of low-cost labor. Not only has the continuance of the program under the Secretary's indifferent administration displaced domestic workers and retarded increases in wages in the agricultural sector, but recent judicial decisions, including the one under review here, have paved the way for increased importation of "temporary" labor.

The increased utilization of H-2 workers has recently become a spectre overshadowing the organizational aims and efforts of *amicus curiae* United Farm

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Immigration and Naturalization Act (set forth at Petition, Appendix C, p. 1c; hereinafter the Immigration and Naturalization Act, 8 U.S.C. §1101 *et seq.*, 66 Stats. 166 (1952) is referred to as "INA"), 8 U.S.C. §1101(a)(15)(H)(ii) provides for admission of aliens temporarily for purposes of performing labor where capable domestic residents cannot be found. In large part, nonimmigrants admitted under this program have been engaged to perform agricultural or logging work. (Cf. 20 C.F.R. §602.10(a).)

Workers. The Secretary has announced Administration contemplation of a five-fold expansion of the H-2 program. And, the decision of the Court of Appeals giving rise to the instant Petition significantly expands those circumstances in which admission of nonimmigrants can displace domestic workers. This expansion effectively undermines clear Congressional safeguards intended to drastically limit the permissible use of non-domestic "temporary" labor.

The decision of the Court of Appeals significantly departs from the standards judicially established in the area of labor certification and ignores both Congressional intent and established administrative regulation. Summarily stated, the applicable statute and implementing regulations require, prior to admission of nonimmigrant workers, that the Secretary determine the "availability" of domestic workers to fill the jobs and establish a wage which will not undermine wages paid domestic workers. This two-fold scrutiny precludes, ideally, the admission of nonimmigrant labor displac-

ing or injuring domestic workers. The Court of Appeals undermines this protection in holding, erroneously, that the "availability" determination is subsumed under the "adverse wage impact" evaluation. This collapsing of a double shield against displacement of domestic workers cannot legally or logically be sustained.

In addition to being analytically unsupportable, the decision of the Court of Appeals, if allowed to stand, signigicantly interferes with the organization and representation of agricultural workers. In its evisceration of the protections accorded domestic workers, the Court of Appeals specifically sanctions use of the H-2 program in circumstances where workers seek, through collective organization, to better their terms and conditions of employment. In practical effect, the Court's decision sanctions use of H-2 workers to break strikes. Such an effect spells the end to incipient farmworker organization, thus permitting agricultural employers to maintain historically low wages and

abysmal working conditions.

The Petition in this action should be granted to affirm and reinstate the clearly-mandated protection of domestic workers from displacement by nonimmigrant labor and prevent the substantial departure by the Court of Appeals from established precedent. The issues raised herein become particularly significant when viewed in terms of Respondent Marshall's announced intent to expand the nonimmigrant workforce in agriculture. If this Court fails to restore the protective barriers against nonimmigrant labor breached, if not destroyed, by the Court of Appeals, not only will organization and improvement in the conditions of the agricultural workforce be drowned in its infancy, but clear Congressional purpose will have been effectively avoided.

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I

THE DECISION OF THE COURT OF APPEAL, IN ESTABLISHING AS A STANDARD FOR CERTIFICATION OF TEMPORARY LABOR THE AVAILABILITY OF DOMESTIC WORKERS WILLING TO WORK AT THE SECRETARY'S ADVERSE IMPACT WAGE, IGNORES CONGRESSIONAL INTENT AND CONTRARY DECISIONS BY COURTS OF APPEALS. REVIEW SHOULD BE GRANTED TO INSURE THE ADMINISTRATION OF THE H-2 PROGRAM IN CONFORMITY WITH CONGRESSIONAL MANDATE.

This case brings before this Court significant issues raised by the statutory authorization for temporary admission of nonimmigrant workers, § 101(a)(15)(H)(ii) of the INA; 8 U.S.C. § 1101(a)(15)(H)(ii) and § 214(c) of the INA; 8 U.S.C. § 1184(c), and implementing regulations (8 C.F.R. § 214.2(h)(3) and 20 C.F.R. §§ 602.10-602.10b.[7] This action

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[7]For a discussion and review of this statutory and administrative framework, see *Rogers v. Larson*, 563 F.2d 617, 622 *et seq.* (3rd Cir. 1977) and *Elton*

originated following the Secretary's certification of temporary nonimmigrant labor to harvest apples, jobs domestic workers were willing to accept and available to perform. (Petition, pp. 3-6.)

In upholding this certification, which effectively displaced domestic workers, the Court of Appeals reasoned that a domestic worker, in order to avoid unemployment occasioned by importation of nonimmigrant labor, had not only to be available for the relevant employment, but also to accept those wages dictated by the Secretary. The conclusion of the Court of Appeals is succinctly stated in its operant language:

> "The case is remanded to the district court to enter a judgment in an appropriate form declaring that a worker who is not able and willing to enter into a contract of employment upon the [conditions, including wages, set forth in 20 C.F.R. §§ 602.10-602.10b] is not available within the statutory meaning when the U. S. Secre-

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Orchards, Inc. v. Brennan, 508 F.2d 493, 495-96 (1st Cir. 1974).

> tary [of Labor] is certifying the need for temporary foreign workers to the [Immigration and Naturalization Service]."

Petition, p.7b; 567 F.2d at 1157. This conclusion annoints the Secretary with the authority and power to dictate the maximum wage to be received by domestic workers and to sanction importation of nonimmigrant labor whenever, and by whatever means,[8] domestic workers refuse to accept the dictated wage.

This result frustrates the extremely proscribed conditions in which the Attorney General, and by delegation the

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[8]The Court of Appeals expressly noted that its decision reached to encompass whatever means domestic workers utilized in seeking better wages and working conditions. (Petition, p. 4b; 567 F.2d at 1155-56.) Thus, if workers went on strike for conditions exceeding those established by the Secretary, nonimmigrant laborers could and should be certified for admission. Not only does this result mock the statutory protection of domestic labor, but it frustrates basic national policy. (See discussion, Section II A, *infra*.

Secretary,[9] by statute may permit importation of nonimmigrant temporary labor. Despite congressional appreciation for the potential need for temporary nonimmigrant workers, the statutory language sanctions their admission only in the most extreme circumstances, to wit, where no domestic workers are available. The decision of the Court of Appeals ignores this obvious intent.

In its blindness to congressional intent and the applicable regulations, the Court of Appeals significantly departs from prior decisions and creates

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[9]The Attorney General, and by delegation the INS, are, pursuant to § 214(c) of the INA, 8 U.S.C. § 1184(c) primarily responsible for certification of temporary nonimmigrant labor admissable under § 101(a)(15)(H)(ii) of the INA, 8 U.S.C § 1101(a)(15(H)(ii). *Castaneda-Gonzalez v. Immigration and Naturalization Service*, 564 F.2d 417, 424 (D.C. Cir. 1977; *dictum*.) Although this primary responsibility lies with the Attorney General, regulations delegate the primary role in the certification process under § 214(c) of the INA, 8 U.S.C. § 1184(c) to the Secretary. (8 C.F.R. § 214.2(h)(3).)

a conflict with other decisions examining and construing the certification process. Prior to the Court of Appeals' decision in this action, courts had consistently divorced the determination of the "availability" of foreign workers from any examination of the adverse effect on domestic workers of the wage to be paid to the immigrants. This conflict will only further exacerbate inconsistencies in decisions concerning applicable standards in labor certification.

A. The Court Of Appeals' Decision Ignores Unambiguous Congressional Intent.

An understanding of Congressional intent in its enactment of the H-2 program can best be evaluated in the context of the origins of the contract labor (H-2) system. With such a focus, the strong statutory protection for domestic workers and limitation of importation of contract labor to only the most desperate circumstances stands in stark contrast to the significant potential expansion

of the H-2 program erroneously written by the Court of Appeals in this action.

1. The Historical Background.

The use of nonimmigrants in the Nation's harvest arose in severe labor shortages artificially created by the manpower demands of the military effort during World War II. Yet, with the end of the War, the use of contract labor did not cease; apparently fearful of labor shortages, growers sought to maintain a steady flow of nonimmigrant labor. (See, Kramer, *The Offshores: A study of Foreign Farm Labor in Florida*, (St. Petersburg, Florida; Community Action Fund, 1966) p. 3, cited in *North American Congress on Latin America Report on the Americas*, Vol. XI, No. 8, "Caribbean Migration" (New York, 1977), p. 11.) The efforts to maintain a non-domestic labor force resulted in establishment of the "Bracero" program (§ 501 *et seq.* of Public Law 78, 65 Stats. 119 as codified at 7 U.S.C. § 1461 *et seq.*) in 1951 and the following year, the INA's provision for importation of contract

labor was enacted. (Section 101(a)(15)(H)(ii) of the INA, 66 Stat. 166, codified at 8 U.S.C. § 1101(a)(15)(H)(ii).) Both these enactments restricted the use of contract labor so as to preclude adverse effects upon domestic workers.

Subsequently, Congress has consistently reaffirmed its intent to avoid adverse impact upon domestic workers resulting from use of nonimmigrant labor. After consideration of amendments of the Bracero program (see, T. Richard Spradlin, "The Mexican Farm Labor Importation Program - Review and Reform", 30 G. Wash. L. Rev. 84, 99 *et seq.*), were unsuccessful in Congress (*Id.*, 30 G. Wash. L. Rev. 311 *et seq.*), the Bracero program was allowed to lapse. (7 U.S.C.A. (West Pub. Co., 1973) § 1461 *et seq.*) In 1965, after recognition of the ineffectiveness of the labor certification program established to prevent immigration of aliens whose residency would adversely affect American workers (see, § 212(a)(14) of the INA, Act of June 27, 1952, Ch. 477, § 212(a)(14), 66 Stat. 183), the section was amended to require the alien to

hurdle a presumption against the propriety of labor certification. (*Pesikoff v. Secretary of Labor*, 501 F.2d 757, 761-762 (D.C. Cir. 1974).) The purpose of the amendment, as stated by Senator Song, was "the protection of the American economy and the wages and working conditions of American Labor." (111 Cng. Record 24463 (1965).) This concern for protection of the domestic worker has remained a subject of substantial concern:

> "Whatever future amendments the Congress may make in the immigration law, it must not lose sight of the fact that its first responsibility is to protect domestic workers from adverse foreign competition."
>
> Hon. Peter Rodino, Jr., "The Impact of Immigration on the American Labor Market", 27 Rutgers L. Rev. 245, 274 (1974).

Indisputably, the clear intent of Congress has been protection of domestic workers from adverse consequences flowing from admitting non-domestic workers to the labor force. This intent clearly circumscribes the permissable use of the

H-2 program.

2. The H-2 Program.

Section 101(a)(15)(H)(ii) of the INA, 8 U.S.C. § 1101(a)((15)(H)(ii) prescribes the permissable circumstances for introducing temporary foreign workers into the American labor market. This section permits admission of temporary workers only "if unemployed persons capable of performing [temporary] service or labor cannot be found *in this country*." [Emphasis added.] Only if *no* workers are available may the H-2 program be invoked.[10]

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[10]Although the regulations of the INS adopted to implement the H-2 program are not here challenged (see discussion, Section IB, *infra*), the difference in the statutory language establishing the H-2 program when compared to certification of immigrants under § 212(a)(14) of the INA, 8 U.S.C. § 212(a)(14) must be read to more significantly restrict permissable use of H-2 certification. (Compare § 101(a)(15)(H)(ii) of the INA, 8 U.S.C § 1101(a)(15)(H)(ii) with § 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14). While under § 212(a)(14) of the INA, 8 U.S.C.

The strong Congressional mandate against use of the H-2 program to displace or injure domestic workers has been duly noted:

> "We recognize . . . that there may be good reason for [the growers'] wish to be able to rely upon the experienced crews of [nonimmigrant labor] who have performed well in the past, but there that preference collides with the mandate of a Congressional policy. To recognize a legal right to use alien workers upon a showing of business justification would be to negate the policy which permeates the immigration statutes, that domestic workers rather than aliens be employed wherever possible."
>
> *Elton Orchards, Inc. Brennan*, 508 F.2d 493, 500 (1st Cir. 1974)

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§ 1182(a)(14) only the immediate area need be searched for available labor (*Ramani v. Secretary of Labor*, 430 F. Supp. 298, 300 (S. D. Fla. 1976); *Jadeszko v. Brennan*, 418 F.Supp., 92, 94 (E.D. Penn. 1976)), the H-2 program mandates the United States as the appropriate labor pool.

3. The Court of Appeal's Decision Undermines The Intent Of The H-2 Program.

The decision of the Court of Appeals in this action effectively mocks this clear Congressional intent to limit the circumstances in which the H-2 program may be utilized. In effect, it allows the importation of nonimmigrant workers upon the mere unwillingness of domestic workers to accept wages dictated by the Secretary.

In its decision, the Court of Appeals held that nonimmigrants could be admitted under the H-2 program where domestic workers were unavailable to work at the wages established by the Secretary as set forth in 20 C.F.R. § 602.10b (a)(1). (Petition, p. 7b; 567 F.2d at 1157; quoted *supra* at 11.) In so holding, the Court effectively states a maximum wage rate for domestic workers, for if domestic workers refuse the Secretary's wage, nonimmigrants may permissably be imported via the H-2 program. This necessarily displaces, in conflict with the strong protection of

domestic workers stated in the immigration laws, a substantial portion of the domestic workforce, i.e., all those workers willing to work at a wage above that dictated by the Secretary. This result clearly ignores and contravenes the condition that H-2 workers can be admitted only if "unemployed persons capable [of working] cannot be found ..." (Section 101(a)(15(H)(ii) of the INA; 8 U.S.C. § 1101(a)(15(H)(ii).)

Widespread application of the Court's rationale could mark the end of domestic labor performing temporary services of labor. All that need be established to begin such a process would be the designation of wages or working conditions the Secretary believes[11] domestic workers

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[11] In testimony before the House, Daniel Sturt of the Regional Manpower Administration, Department of Labor defined the wage rates set forth in 20 C.F.R. § 602.10b(a)(1) as "those rates which the Department of Labor *believes* should be paid to foreign and domestic workers." (*Oversight Hearings on Department of Labor Certification of Offshore Labor Before the House Committee on Education*

should accept. If insufficient workers accept these wages, or if, through collective bargaining, more substantial benefits are sought, nonimmigrants could be imported. The mere statement of this consequence indicates the Court of Appeals' total disregard of the Congressionally-mandated protection of domestic workers.

Finally, the Court of Appeals' emphasis upon those wage rates established by the Secretary in practical effect disadvantages domestic workers by withdrawing wage determination from the marketplace. Practical experience reveals that the administrative designation of wages undermines competition in regard to wages and results in low wages, thus displacing domestic workers who are required to earn amounts consistent with higher costs of living in this country. (See, *Spradlin*, *supra*, 30 G. Wash. L.

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and Labor, Subcommittee on Agricultural Labor, 94th Cong., 1st Sess. (March 20, 1975) p. 15. Hereinafter referred to as "Hearings".)

Rev. at 107 *et seq.*)[12] This effective withdrawal of wage determination from the marketplace necessarily contravenes

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[12]The adverse impact wage established by the Secretary in 20 C.F.R. § 602.10b (a)(1) bears no relation to a market-established wage. The formula setting the rate has been described as follows:

> "The initial [adverse effect] rates were . . . [f]or the majority of [s]tates . . . based on the national average hourly farm wage rate . . . Between 1963 and 1968 slightly different formula were used . . . From 1968 to the present time, the rates have been adjusted annually by applying the statewide percentage change in the USDA hourly farm wage rate."
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> Hearings, p. 22

This method, which had no relation in its inception to the particular crop or local conditions, provides adjustments independent of the marketplace for workers in a particular crop. Under this method, the somewhat ironic circumstance developed that the Secretary's wage in certain crops was lower than the wage for such crops mandated by other applicable federal legislation. (See, *Florida Sugar Cane League v. Usery*, 531 F.2d 299, 301-302 (5th Cir. 1976).)

Congressional intent.

B. The Decision Of The Court Of Appeals Is In Conflict With The Applicable Regulations And Conflicts With Other Court Of Appeals Decisions.

In its opinion, the Court of Appeals accords the applicable regulations scant concern or analysis, at points misstating the ostensibly controlling regulations.[13] The failure of the Court to analyze the regulatory scheme implementing the H-2 program creates substantial conflict between the clear import of the regulations and the declaratory judgment ordered. Further conflict arises when the Court's decision is analyzed in light of decisions of other Courts of Appeal.

1. The Regulatory Framework.

Under the mandate of § 184(c) of the INA, 8 U.S.C. § 1184(c), the Attorney

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[13] See Petition, p. 8, fn. 16.

General, through the Immigration and Naturalization Service, has delegated to the Secretary the responsibility for certifying the need for temporary nonimmigrant labor. (8 C.F.R. § 214.2(H)(3)(1973).) This delegation specifies that H-2 workers are admissable only if (1) there are no available domestic workers *and* (2) the wages to be paid will not adversely affect the wages and working conditions of domestic workers. (8 C.F.R. § 214.2(H)(3)(i).) This language, invoking the conjunctive, states a two-fold hurdle to admission of H-2 workers, a protection ignored by the Court of Appeals' holding that nonimmigrant labor may be admitted if available domestic workers seek wages *or* benegits higher than the "adverse effect wage."

In large part, the Secretary's regulations adopted pursuant to the delegation in 8 C.F.R. § 214.2(H)(3) restates this bipartite limitation upon admission of H-2 workers. Not only must an employer requesting such workers pay the "adverse impact wage" and determine that no domestic workers are available, but

efforts to obtain domestic workers willing to work at the adverse impact wage must be continued even during the period nonimmigrant labor is admitted.[14]

Thus, regulations establishing the conditions for H-2 certification require determination that there exists an absence of domestic workers to perform the work and that the wages and benefits to be paid the H-2 workers will not adversely affect domestic workers. This

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[14]The Court of Appeals apparently misread 8 C.F.R. § 602.10(d)(2) to require the simple determination that domestic workers were not available at the "adverse impact wage". However, a reading of the regulatory language (*Id.*) consistent with the Attorney General's delegation provides no solace for the Court of Appeal in its reading of the regulation. Clearly, 8 C.F.R. § 602.10(d)(2) requires employers to continue recruitment of domestic labor at the adverse impact wage if the available work is done by H-2 workers and is of the kind for which domestic workers have been determined to be unavailable. This is the only interpretation of the language consistent with 8 C.F.R. § 214.2(H)(3) . . . and § 101(a)(15)(H)(ii) of the INA, 8 U.S.C. § 1101(a)(15)(H)(ii).

conclusion, rejected by the Court of Appeals, finds further support in the obvious intent of the Attorney General to require at a minimum, the standards set forth in § 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14). The use of language in 8 C.F.R. § 214.2(H)(3) paralleling the language adopted by the Secretary in implementing § 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14), indicates the Attorney General's intent to apply the same standards.[15]

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[15]In pertinent part, 8 C.F.R. § 214.2(H)(3)(i) (1973) provides that admission of H-2 workers requires a certificate of the Secretary that:

> "qualified persons in the United States are not available and that the employment of [the H-2 worker] will not adversely affect the wages and working conditions of workers in the United States similary employed . . ."

At the time this delegation was promulgated, the Secretary's regulations pursuant to § 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14) provided in pertinent part, that an alien would not

(See *United States v. Cooper Corporation*, 312. U.S. 600, 606 (1941); *United States v. Vargas*, 380 F. Supp. 1162, 1166 (E.D.N.Y. 1974)). Section 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14) clearly requires the determination of adverse effect to be disassociated from investigation of the availability of domestic workers.[16]

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be certified unless the Secretary determined

> "that qualified U.S. workers are not available and that [the alien's] employment will not adversely affect wages and working conditions of the workers in the United States similarly employed."
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> 29 C.F.R. § 60.1 (1971); superseded and reworded, 20 C.F.R. § 656.00 (1977).

These regulations then set forth specifics in which aliens would be certified.

[16]Under § 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14), the Secretary has generally determined that there are "sufficient United States workers . . . able, willing, qualified and available" (20 C.F.R. § 656.11(a)) to "plant, cultivate and harvest farm products" (20 C.F.R.

In view of the applicable regulatory language, the Court of Appeal's decision cannot stand.

2. The Courts of Appeals' Interpretation Of The "Availability" Requirement.

Given the obvious relationship between H-2 and Section 214(a)(14) certification, decisions of the Courts of Appeal aid in interpreting the standards for determining availability. From this perspective, the decision of the Court of Appeals in this action stands in isolated conflict with other applicable decisions of the Circuits.

The federal courts have consistently analyzed the question of the availability of domestic workers without reference to wages demanded; the investigation pursued simply inquiries

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§ 656.11(b)(33)). The H-2 certification in this case is thus somewhat incongruous, given the Attorney General's intent to parallel H-2 and § 214(a)(14) certification. (See fn. 15, *supra*.)

whether qualified workers are available to do the required job. (See, *Acupuncture Center of Washington v. Dunlap*, 543 F.2d 852 (D.C. Cir. 1976), *cert. den.*, ___ U.S. ___, 97 S.Ct. 62; *See v. Department of Labor*, 523 F.2d 10 (9th Cir. 1975); *Silva v. Secretary of Labor*, 518 F.2d 301, 309-310 (1st Cir. 1975); *Pesikoff v. Secretary of Labor, supra.*) In not one of these cases has the focus been upon the availability of workers at a particular wage, the standard adopted by the Court of Appeals in this action.

The clear differentiation between examination of availability, on the one hand, and adverse impact, on the other, was specifically noted by the Court in *Silva v. Secretary of Labor, supra.* Criticizing the Secretary's "availability" determination, the Court nonetheless noted that even where domestic workers were not available, certification might still justifiably be refused on the basis of "adverse impact". (518 F.2d at 310 (*dictum*).)

The Court of Appeals' decision challenged herein thus conflicts with the clear import of decisions construing § 212(a)(14) of the INA, 8 U.S.C. § 1182(a)(14). Review in this action must be granted to affirm the necessary separation of the "adverse effect" and "availability" determinations for labor certification. Without such affirmance, substantial protections accorded domestic workers will be effectively diluted.[17]

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[17] *Rogers v. Larson*, 563 F.2d 617 (3rd Cir. 1977) cited by the Court of Appeals in its decision (Petition, p. 5b; 567 F.2d at 1156) is totally inapposite. *Rogers* concerned state statutory enactments regulating the duration of a non-immigrant's period of work. The Court in *Rogers* found this regulation inconsistent with the extensive federal regulation of the H-2 program. The decision in no way analyzed the appropriate inquiry prior to admitting workers pursuant to such program.

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II

THE PETITION SHOULD BE GRANTED TO PREVENT FRUSTRATION OF ESTABLISHED POLICY AND TO PREVENT IRREPARABLE INJURY TO THE AMERICAN FARM WORKER.

The decision of the Court of Appeals in this action substantially weakens the barriers to use of nonimmigrant temporary labor clearly specified by Congress. (See discussion, Section I-A, supra.) Not only does this ignore Congressional concerns, but substantially threatens both established policy and the welfare of workers.

The day has long passed since the contention could be questioned that basic policy protects the right of workers to organize collectively for betterment of their wages and working conditions. Although somewhat belated, organizing of agricultural laborers has passed the gestation stage to yield circumstances where substantial numbers of farmworkers have been organized. Yet, this increasing advancement of farmworker organization stands in danger of an abrupt

termination if the decision of the Court of Appeals stands to regulate the circumstances in which nonimmigrant labor can displace domestic workers.

Substantial displacement of domestic workers would irreparably damage American labor. In circumstances of high unemployment, the Court of Appeals' decision encourages admission of nonimmigrant labor. The failure of domestic workers to receive the jobs awarded H-2 workers not only prevents a decrease in debilitating unemployment, but serves to reduce money flowing into the economy. The ripples of affect spreading from admission of H-2 workers will irreparably injure not only the domestic agricultural workforce, but the nation's economy in general.

Such interference with collective activity and detrimental impact on the economy of this country could not be intended effects of the H-2 program. This Court should grant the Petition to prevent such effects.

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A. The Decision Of The Court Of Appeals Undermines Policies Protecting Collective Bargaining And Constitutional Rights.

Since adoption of the National Labor Relations Act (29 U.S.C. § 151 *et seq.*), collective action by American workers has been recognized as protected. The decision of the Court of Appeals undermines this protection, for the decision particularly notes that collective activitiy demanding higher wages or benefits than those dictated by the Secretary renders participating workers subject to displacement by H-2 workers. (Petition, p. 4b; 567 F.2d at 1155-56.)

The public policy of this county has been stated to protect workers in their collective activity for advancement of wages and working conditions. (§2 of the Norris-LaGuardia Act, 29 U.S. §102, quoted, in part, at Petition, pp. 11-12.) This policy also finds support in state enactments expressive of the same concern for protection of labor's association for the purpose of mutual gain. (E.g., California Labor Code §923.) Such ex-

pressions of policy have been found substantively to protect workers' associational activities (See, e.g., *Wetherton v. Growers Farm Labor Association*, 725 Cal. App.2d 168, 79 Cal.Rptr. 543.)

The generally stated policy protective of collective activity by labor has, for farmworkers, been specifically recognized by enactment of legislation to protect their rights to organize.[18] (Petition, p.14, fn. 26.) Thus, the California Legislature has stated

> "[Agricultural] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."
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> California Labor Code § 1152.

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[18] Agricultural employees are, of course, excluded from coverage by the National Labor Relations Act, as amended (§2(3) of the NLRA, 29 U.S.C. §152(3)). This cannot be read as a congressional statement that farmworkers are not protected in their efforts to organize. Austin P. Morris, *Agricultural Labor and National Labor Legislation*, 54 Cal.L.Rev. 1939, 1951, *et seq.* (1966).

There thus can exist little dispute that this country's policy protects the right of agricultural workers to join together for mutual aid and protection. This policy effectly reflects the protection of labor organizing stated in the Constitution. (*Hanover Township Fed. of Teachers Local 1954 v. Hanover Com. School Corp.*, 457 F.2d 456 (7th Cir., 1972); *McLaughlin v. Tilendis*, 398 F.2d 287, 288 (7th Cir., 1968). See, e.g., *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958); *Thomas v. Collins*, 323 U.S. 516 (1975).)

This policy protecting collective organization by agricultural employees has recently been translated, in various states, into administrative mechanisms for recognition of labor organizations and protection of workers' rights to organize. Since the passage of the California Agricultural Labor Relations Act, California Labor Code §1140 *et seq.*, in June, 1975, over 500 elections have been held for certification and literally thousands of Unfair Labor Practice

proceedings have been initiated.[19] In this climate facilitating organizational activities by farmworkers, the number of agricultural workers represented by collective bargaining agreements has increased markedly. A correlative rise in the protections and benefits received by California agricultural workers has, expectedly, resulted. Whereas the first collective bargaining agreements signed involving California agricultural employees set a minimum wage rate of $1.25 per hour, the most recently executed contracts establish a wage rate of $3.80 per hour. In addition, benefits (including pension plans, medical benefits, and payment for jury service) hitherto unavailable to agricultural workers have been extended to thousands of persons. One offshoot of the increased wage and benefit package available to farmworkers has been a resulting decrease in the number of workers forced to migrate

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[19] These statistics are compiled from records maintained by *amicus curiae* United Farm Workers.

from one area to another in search of work.[20]

These gains, and the policy protecting organization among agricultural labor, stands in danger of being dissembled. If allowed to stand as the dispositive interpretation of circumstances in which H-2 workers are admissable, the Court of Appeals' decision would substantially undermine both federal and state policy favoring collective bargaining as the means for resolving employer-employee relations in the agricultural sphere and weaken, if not destroy, the incipient organizational effects involving agricultural employees. The Court of Appeals

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[20]The *Salinas Californian* of April 15, 1978, p. 1, reported that a recent university survey among employers in agriculture in Monterey County, California, indicated that the agricultural workforce was becoming substantially less migratory. As one worker working under a collective bargaining agreement noted:

> "I make enough working in the lettuce - eight months of steady work - to get by for me and my family. And this way, we have a home."

clearly states that if workers, through exercise of their rights, join together to advance their wages and working conditions, an agricultural employer can, on that basis, deem such workers unavailable and seek certification of H-2 workers. The consequence, admission of H-2 workers in circumstances where workers are organizing, would inevitably be the defeat of the organizational efforts.

A scenario can easily be imagined to illustrate the injury to collective activity by agricultural workers if the decision of the Court of Appeals remains unexamined. The circumstance could arise in which agricultural workers join together to seek a health insurance program covering them and their families.[21] The workers might engage in collective action, such as a strike, for purposes of obtaining this benefit. Since health

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[21]The Secretary's regulations provide that insurance need only provide for injury resulting from job-related accidents. (20 C.F.R. §602.10a(c).)

insurance is not one of the benefits believed necessary and thus dictated by the Secretary, under the Court of Appeals' decision, the workers on strike would be "unavailable" for determination of whether H-2 workers are admissable. Their employer could then seek certification of workers pursuant to 20 C.F.R. §§602.10-10b. Nonimmigrant workers would then be admissable under §101(a)(15)(H)(ii) of the INA, 8 U.S.C. §1101(a)(15)(H)(ii). In effect, H-2 workers would be imported for purposes of breaking a strike by domestic workers.

Similarly, the decision of the Court of Appeals frustrates any efforts by domestic workers to improve their earnings. Any collective action by domestic workers to secure higher pay than that mandated by the Secretary would *ipso facto* determine their status under applicable regulations as one of unavailability for the work. In view of the unavailability of workers, certification would be sought and H-2 workers imported to undermine the efforts of the

workers to secure a higher wage.[22]

There can be little dispute that agricultural workers, faced with some of the most difficult working conditions, are nonetheless among the least paid and most severely disadvantaged; they occupy a second class status in terms of the availability of organized representation and their ability to improve their present conditions. In spite of this status, organizational efforts among farm workers have recently begun to bear fruit, with improved wages and working conditions being the result of success in these efforts. The decision of the Court of Appeal, if allowed to stand, would write a quick, and probably irreversable, finish to the organization of domestic

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[22]In effect, such circumstances have occurred. Texas growers, unable to find workers willing to work at a liveable wage, convinced Respondent Castillo that H-2 workers from Mexico should be admitted at less than the wage set by the Secretary as the minimum wage to be paid. This incident was reported in *The New York Times*, June 21, 1977, p. 1, and the *Salinas Californian*, June 21, 1977, p. 1.

farmworkers.[23] The protections accorded agricultural workers in their organizing would have undermined and, in effect, the Secretary would dictate wage and benefits in agriculture, enforcing the worker's acquiescance through the threat, if not the reality, of imported foreign labor.

The policy of this County is to protect domestic workers, leaving wages and benefits to be paid to the action of the marketplace. (*Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976).) The Court of Appeals' decision would undermine this policy, and frustrate the policy favoring collective

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[23] It is historically uncontestable that foreign labor has been utilized as a means to keep wages low among farmworkers and insure that this segment of the workforce remains beyond the reach of organizational efforts. (See, e.g., Jacques E. Levy, *Cesar Chavez: Autobiography of La Causa*, p. 132 *et seq.* (W. W. Norton & Company, Inc., New York, 1975); *Spradlin, supra*, p. 108.

activity by workers, by designating the Secretary's required wages for H-2 workers as the amounts American workers must accept and forcing conformity with these wage rates by allowing importation of H-2 workers when domestic workers balk at the Secretary's dictates. Such circumstances cannot, in logic or policy, be allowed to stand, and the decision of the Court of Appeals must be reviewed.

B. If The Decision Of The Court Of Appeals Is Allowed To Stand, Substantial Injury Will Be Done To The American Workforce.

As discussed above (*supra* at pp. 18), § 101(a)(1)(H)(ii), 8 U.S.C. § 1101(a)(15)(H)(ii), provides that nonimmigrant workers should be admitted to perform temporary labor only if there are not persons unemployed in the country. Despite this clear statement limiting the admissability of foreign workers, the Secretary has recently announced, in spite of the substantial unemployment in this country, that plans are in effect to increase the number of

H-2 workers from approximately 20,000 to 100,000.[24] Such an action, which is ostensibly permitted pursuant to the decision of the Court of Appeals, would substantially affect the domestic workforce. A number of consequences from an increase in nonimmigrant workers can be noted.

For one, the admission of 100,000 foreign workers will mean that 100,000 jobs will not be open to domestic workers.[25]

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[24]Secretary Marshall was quoted in an article printed in the *Fresno Bee*, August 31, 1977, p. 1, as saying that the administration was planning to increase the number of foreign laborers admitted under the H-2 program and that he didn't expect the number of admissions to exceed 100,000.

[25]Any argument that domestic workers are not willing to perform agricultural jobs is patently specious. They may be unwilling to work at the Secretary's speculative "prevailing" wage (see fn. 12, *supra*), but there is no evidence that a decent, liveable wage would not yield domestic workers willing and available to work in the fields. The experience upon the termination of the

Second, the undermining of organized labor in agriculture (see discussion, section II-A, *supra*) will result in severe displacement of domestic workers. Former migrant workers able to establish homes because of unionization (see fn. 20, *supra*) would be forced back into the difficult migratory pattern. Not only does this affect the worker, but community stability will be affected.

Thirdly, the importation of foreign workers will mean that wages earned in this country will be expended in foreign countries rather than used in the domestic economy.[26] The present im-

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Bracero program showed that grower claims that domestic workers will not engage in farmwork are unsupportable. Morris, *supra*, fn. 18, pp. 1941-42. And, the Secretary has determined that there are sufficient number of farmworkers. (See fn. 16, *supra*.)

[26]Contracts negotiated with the West Indies, for example, provide for a certain sum of money to be placed into reserve to be sent to the worker's home country. (Hearings, p. 22 *et seq.*)

balance between exports and imports condemns this consequence of the increased admission of H-2 workers.

These illustrations of affects resulting from implementation of the proposed increase in H-2 workers sanctioned by the Court of Appeals' decision reveal consequences anathema to and violative of the Congressional intent in establishment of the H-2 program. Clearly, the strict limitation placed upon the circumstances in which nonimmigrant labor could be admitted under § 101(a)(15)(H)(ii) of the INA, 8 U.S.C. § 1101(a)(15)(H)(ii) was designed to insure that domestic workers would not be adversely affected by such admission. If the decision of the Court of Appeals is not reviewed by this Court, the prohibited adverse effect on the domestic workforce will surely result. The Petition in this case should be granted to prevent this unacceptable result.

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CONCLUSION.

The United Farm Workers, formed to improve the deplored and desperate circumstances in which farmworkers were forced to labor, has, through the organization of segments of the agricultural workforce, improved the conditions in which our Nation's agricultural commodities are grown and harvested. These advances stand, however, on the verge of being reversed, with a consequent imposition of the previously universally condemned conditions. The threat to the advances by farmworkers has been created by the Court of Appeals' decision in this action, which sanctions the admission of nonimmigrant temporary labor to undermine the domestic workforce.

This decision cannot be justified, either by reference to the applicable statutes and implementing regulations or the basic policies of this Country. As noted herein, the Court of Appeals has misread the applicable authority and given short concern to the adverse

impact of its decision on the Nation's policies.

The Petition on file in this action should be granted to reaffirm the clear Congressional intent with regard to importation of non-domestic workers and to prevent the unacceptable results which will necessarily follow if the decision in this action is allowed to stand. Failure to accept the petition can only result in unacceptable consequences, both to farmworkers and the Nation.

April 19, 1978.

Respectfully submitted,

JEROME COHEN

GEORGE C. LAZAR

Attorneys for Amicus Curiae United Farm Workers of America, AFL-CIO

Service of the within and receipt of a copy thereof is hereby admitted this _____ day of April, A.D. 1978.

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